

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WILLIAMS BUSINESS SERVICES,
INC.,

Plaintiff,

v.

WATERSIDE CHIROPRACTIC, INC., et
al.,

Defendants.

CASE NO. C14-5873 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS

This matter comes before the Court on Defendants Waterside Chiropractic, Inc. ("Waterside"), Dr. Michael J. Smith, and Dr. Sylvia M. Smith's (collectively "Waterside Defendants") motion to dismiss for lack of personal jurisdiction (Dkt. 44). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part and denies in part the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On October 31, 2014, Plaintiff Williams Business Services, Inc. ("Williams") filed a complaint against Defendants alleging numerous federal and state claims. Dkt. 1 ("Comp.").

1 On February 11, 2016, the Waterside Defendants filed a motion to dismiss for lack
2 of personal jurisdiction. Dkt. 44. On February 29, 2016, Williams responded. Dkt. 52.
3 On March 4, 2016, the Waterside Defendants replied. Dkt. 56.

4 II. FACTUAL BACKGROUND

5 Williams is a Washington corporation that designs, develops, and hosts websites.
6 Comp., ¶¶ 6, 14; Dkt. 53, Declaration of Douglas Williams (“Williams Dec.”), ¶ 8.
7 Waterside is a Florida corporation that provides chiropractic health care services across
8 six locations in Florida. Dkt. 45, Fourth Declaration of Dr. Michael Smith, ¶ 2. Dr. M.
9 Smith and Dr. S. Smith own and operate Waterside. *Id.*, ¶ 1.

10 In 2013, Waterside’s agent, Penny Zencker, contacted Williams to inquire about
11 improving Waterside’s website. Williams Dec., ¶¶ 2–3. In September 2013, Dr. Sylvia
12 Smith contacted Williams in Washington to obtain a cost estimate and proposal for a new
13 Waterside website. Williams Dec., ¶ 6. Williams drafted and emailed a work proposal,
14 which in basic terms offered to redesign the website for \$10,000. Comp., Exh 1.
15 Waterside reviewed the work proposal, negotiated and signed an amended proposal, and
16 faxed Williams the signed signature page of the proposal along with a copy of the initial
17 \$5,000 payment. Comp., ¶¶ 18–21.

18 On March 27, 2014, Williams completed and published Waterside’s website. *Id.*,
19 ¶ 30. On March 31, 2014, Williams sent an invoice to Waterside for the remaining
20 \$5,000 payment and additional hosting fees. *Id.*, ¶¶ 31–32. Williams contends that,
21 instead of paying the invoice, the Waterside Defendants continued to request changes and
22 alterations to the website. *Id.*, ¶ 33.

1 On June 1, 2014, Waterside paid Williams \$2,500 instead of the full invoiced
2 amount of \$5,000 plus hosting fees. *Id.*, ¶ 46. In July 2014, Williams offered Waterside
3 an unlimited license to use the website in an effort to resolve the payment dispute
4 between the parties. *Id.*, ¶55. Without receiving a response to its offer, Williams turned
5 over all the website materials it had to Waterside and stopped controlling the website. *Id.*
6 On September 8, 2014, Dr. Sylvia Smith rejected the unlimited license offer and
7 threatened to sue Williams if it did not perform additional work. *Id.*, ¶¶ 57–58.

8 On September 24, 2014, Williams filed an application with the United States
9 Copyright Office to copyright the Waterside website. Comp., Exh. 4. On September 29,
10 2014, Williams’s counsel in Washington sent a letter notifying Waterside that Williams
11 owned the copyrights to the website and that Waterside only held a license to use the
12 website. *Id.*, Exh. 7. October 9, 2014, Williams’s counsel sent a cease-and-desist letter
13 notifying Waterside that Williams terminated Waterside’s website license and
14 Waterside’s continued use would willfully infringe its copyright. *Id.*, Exh. 9. It is
15 undisputed that Waterside did not respond to the letter, Williams successfully removed
16 the website from the original hosting company, Waterside engaged a new hosting
17 company to publish the same website, and Williams successfully removed the website
18 from the new hosting company. This lawsuit followed.

19 III. DISCUSSION

20 A. Standard

21 The plaintiff bears the burden of showing that the Court has personal jurisdiction
22 over all defendants. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th

1 Cir. 2004). In the absence of an evidentiary hearing, the plaintiff need only make a prima
2 facie showing of personal jurisdiction. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th
3 Cir. 2008). Uncontroverted allegations in the complaint must be taken as true, and
4 “[c]onflicts between the parties over statements contained in affidavits must be resolved
5 in the plaintiff’s favor.” *Id.* (quoting *Schwarzenegger*, 374 F.3d at 800).

6 Where, as here, there is no applicable federal statute governing personal
7 jurisdiction, the court applies the law of the state in which the court sits. *See* Fed. R. Civ.
8 P. 4(k)(1)(A); *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998).
9 Washington’s long-arm statute extends jurisdiction over a defendant to the fullest extent
10 permitted by the Due Process Clause of the Fourteenth Amendment. *See* Wash. Rev.
11 Code § 4.28.185; *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 771 (1989). The
12 relevant question, therefore, is whether the requirements of due process are satisfied by
13 the exercise of personal jurisdiction over the Waterside Defendants.

14 **B. Due Process**

15 Due process requires that to exercise jurisdiction over a non-resident defendant,
16 the defendant “have ‘certain minimum contacts’ with [the forum state] such that the
17 maintenance of the suit does not offend traditional notions of fair play and substantial
18 justice.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In this case, Williams
19 asserts that the Court has specific jurisdiction over the Waterside Defendants. Dkt. 52 at
20 4. The Ninth Circuit has established a three-part test to determine whether a court has
21 specific personal jurisdiction over a defendant:
22

1 (1) The non-resident defendant must purposefully direct his
activities or consummate some transaction with the forum or resident
2 thereof; or perform some act by which he purposefully avails himself of the
privilege of conducting activities in the forum, thereby invoking the
3 benefits and protections of its laws;

4 (2) the claim must be one which arises out of or relates to the
defendant's forum-related activities; and

5 (3) the exercise of jurisdiction must comport with fair play and
substantial justice, i.e. it must be reasonable.

6 *Schwarzenegger*, 374 F.3d at 802. "The plaintiff bears the burden of satisfying the first
7 two prongs of the test." *Id.* If the plaintiff does so, "the burden then shifts to the
8 defendant to 'present a compelling case' that the exercise of jurisdiction would not be
9 reasonable." *Id.*

10 For the purposeful action prong, Williams's position is less than clear. Williams
11 asserts that the Waterside Defendants "purposefully directed" their activities at the forum
12 and that this satisfies "both the 'purposeful availment' and 'purposeful direction' prongs
13 of the jurisdictional test." Dkt. 52 at 11–12. Williams, however, fails to recognize that
14 these are two different tests with different elements and that the separate tests require
15 different types of evidence. For example, "[a] showing that a defendant purposefully
16 availed himself of the privilege of doing business in a forum state typically consists of
17 evidence of the defendant's actions in the forum, such as executing or performing a
18 contract there." *Schwarzenegger*, 374 F.3d at 802. On the other hand,

19 [a] showing that a defendant purposefully directed his conduct toward a
forum state . . . usually consists of evidence of the defendant's actions
20 outside the forum state that are directed at the forum, such as the
distribution in the forum state of goods originating elsewhere.
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1 *Id.* at 803. Williams fails to address these separate tests and fails to correlate evidence or
2 allegations satisfying each element of each test. With this failure in mind, the Court will
3 turn to each test.

4 **1. Availed**

5 To be subject to specific jurisdiction, a defendant must have “purposefully
6 avail[ed] itself of the privilege of conducting activities within the forum State, thus
7 invoking the benefits and protections of its laws.” *Burger King Corp. v. Rudzewicz*, 471
8 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

9 “Purposeful availment” requires that the defendant “have performed some type of
10 affirmative conduct which allows or promotes the transaction of business within the
11 forum state.” *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988).

12 In breach of contract cases, the mere existence of a contract with a party in the
13 forum state does not constitute sufficient minimum contacts for jurisdiction. *Burger*
14 *King*, 471 U.S. at 478. Instead, the Court

15 must look to prior negotiations and contemplated future consequences,
16 along with the terms of the contract and the parties’ actual course of dealing
17 to determine if the defendant’s contacts are substantial and not merely
18 random, fortuitous, or attenuated.

19 *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (quoting *Burger King*, 471 U.S. at
20 479).

21 In this case, Williams has failed to show any substantial contacts by the Waterside
22 Defendants beyond the existence of the contract. While it is true that the Waterside
Defendants and its agent reached out to Williams in Washington, this contact as well as

1 the formation of the contract is insufficient to established sufficient minimum contacts.
2 *Boschetto*, 539 F.3d at 1017 (“[A] contract alone does not automatically establish
3 minimum contacts in the plaintiff’s home forum.”). Moreover, Williams’s performance
4 of his obligations under the contract in Washington is also insufficient because such
5 actions are not contacts by any defendant. *Picot v. Weston*, 780 F.3d 1206, 1213 (9th Cir.
6 2015) (“the fact that a contract envisions one party discharging his obligations in the
7 forum state cannot, standing alone, justify the exercise of jurisdiction over another party
8 to the contract.”). With regard to Williams’s ongoing obligations, they consist of
9 additional work by Williams and hosting fees by companies that were not Washington
10 businesses. These are not actions by defendants that promote business within
11 Washington. Therefore, the Court concludes that Williams has failed to show that the
12 Waterside Defendants purposely availed themselves of the privilege of conducting
13 activities within Washington.

14 **2. Directed**

15 Williams has also asserted causes of action that sound in tort, including intentional
16 copyright infringement. In analyzing whether a court has specific personal jurisdiction
17 over a tort claim, the Court applies a three-part “effects” test derived from *Calder v.*
18 *Jones*, 465 U.S. 783 (1984). See *Schwarzenegger*, 374 F.3d at 803. Under this test, a
19 defendant purposefully directed his activities at the forum if he: “(1) committed an
20 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant
21 knows is likely to be suffered in the forum state.” *Id.* (quoting *Dole Food Co. v. Watts*,
22 303 F.3d 1104, 1111 (9th Cir. 2002)). In applying this test, the Court must “look[] to the

1 defendant's contacts with the forum State itself, not the defendant's contacts with persons
2 who reside there." *Walden*, 134 S. Ct. at 1122. Thus, a "mere injury to a forum resident
3 is not a sufficient connection to the forum." *Id.* at 1125. Rather, "an injury is
4 jurisdictionally relevant only insofar as it shows that the defendant has formed a contact
5 with the forum State." *Id.*

6 In this case, the parties dispute the second element of the test, which is whether the
7 Waterside Defendants expressly aimed an intentional act at Washington. In *Washington*
8 *Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 678–79 (9th Cir. 2012), the Ninth
9 Circuit concluded

10 that [defendant's] alleged willful infringement of [plaintiff's] copyright,
11 and [defendant's] knowledge of both the existence of the copyright and the
12 forum of the copyright holder, is sufficient "individualized targeting" to
establish the "something more" necessary to satisfy the express aiming
requirement.

13 Subsequently, the Supreme Court issued its opinion in *Walden*, which some district
14 courts in this circuit have concluded either implicitly overruled *Washington Shoe* or, at
15 the least, put *Washington Shoe*'s continuing validity in question. *See, e.g., Adobe Sys.*
16 *Inc. v. Cardinal Camera & Video Ctr., Inc.*, No. 15-CV-02991-JST, 2015 WL 5834135,
17 at *3–5 (N.D. Cal. Oct. 7, 2015) ("*Washington Shoe* cannot be reconciled with *Walden*
18 and . . . *Walden* effectively overrules *Washington Shoe*."); *Erickson v. Nebraska Mach.*
19 *Co.*, No. 15-CV-01147-JD, 2015 WL 4089849, at *3 (N.D. Cal. July 6, 2015) ("*Walden*
20 overrides *Washington Shoe* generally . . ."). Although the Ninth Circuit has not directly
21 addressed this issue, the court recently stated that it was "guided by the Supreme Court's
22 recent decision in *Walden*," which "reinforced the traditional understanding that our

1 personal jurisdiction analysis must focus on the defendant's contacts with the forum state,
2 not the defendant's contacts with a resident of the forum." *Picot*, 780 F.3d at 1214.

3 While it is unfortunate for the parties and the Court that there is not a clear answer
4 on this question, the language of *Walden* and *Picot* counsels against Williams's
5 arguments in this case. Ignoring the Waterside Defendants' contacts with Williams, there
6 is an absence of any evidence or allegation in the record regarding the Waterside
7 Defendants' contacts with Washington. In fact, the parties expressly agreed that the
8 allegedly infringing website would target potential customers in Florida. Comp., Exh. 1
9 at 3 ("We are proposing a new website that is optimized to attract organic search traffic
10 from the northern Florida area and designed to get more new patients."). As such, there
11 is no evidence of an intentional act expressly aimed at Washington that establishes
12 contact with Washington. Williams's alleged injury is "not tethered to [Washington] in
13 any meaningful way" and "would follow [Williams] wherever [it] might choose to live or
14 travel." *Picot*, 780 F.3d at 1215. Therefore, the Court concludes that Williams has failed
15 to show that personal jurisdiction exists over the Waterside Defendants.

16 **C. Attorneys' Fees**

17 Having concluded that the Waterside Defendants are not subject to personal
18 jurisdiction in this state, the Court must consider whether they are entitled to their
19 reasonable attorney's fees.

20 In the event the defendant is personally served outside the state on
21 causes of action enumerated in this section, and prevails in the action, there
22 may be taxed and allowed to the defendant as part of the costs of defending
the action a reasonable amount to be fixed by the court as attorneys' fees.

1 RCW 4.28.185(5). As the text reflects, however, an award is discretionary and not
2 mandatory. *See Johnston v. Hines GS Props., Inc.*, 114 Wn. App. 1013, at *5 (2002).

3 In this case, the Court concludes that an award of fees is not appropriate. The
4 relevant legal issue is both complicated and not precisely settled. In such circumstances,
5 the Court is unable to fault Williams for contending that the Court had personal
6 jurisdiction over the Waterside Defendants in this forum. Therefore, the Court denies the
7 request for fees.

8 IV. ORDER

9 It is hereby **ORDERED** that the Waterside Defendants' motion to dismiss for lack
10 of personal jurisdiction (Dkt. 44) is **GRANTED on the merits** and **DENIED as to the**
11 **request for fees**. The Clerk shall close this case.

12 Dated this 6th day of May, 2016.

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15 BENJAMIN H. SETTLE
16 United States District Judge
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